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No. 80-2207

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MILTON J. SMITH, TRUSTEE,

Appellant,

v.

COMMISSIONER OF REVENUE,

Appellee.

On Appeal From The Supreme Judicial Court
For The Commonwealth of Massachusetts

MOTION TO DISMISS

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QUESTION PRESENTED

Whether Massachusetts may impose a property tax on real property and an income tax on rents generated by that property.

STATEMENT OF THE CASE

The Commissioner of Revenue accepts appellant's statement of the case.

ARGUMENT

Under Massachusetts law, real estate is subject to local taxation under M.G.L. c. 59 and the rents and profits, if any, are included in the owner's gross income for state income tax purposes pursuant to M.G.L. c. 62. The 1971 revision of M.G.L. c. 62 at issue in this case "completely rewrote the Income Tax Law." Barnes v. State Tax Commission, 363 Mass. 589, 592-93 (1973). "[T]he Legislature was fully aware of the fact that rental income would be taxed under the proposed revision" of the statute. Ingraham v. State Tax Commission, 368 Mass. 242, 245 (1975).

There is no impermissible double taxation here. Ownership and use are distinct, and each may be taxed separately. See New York ex rel. Cohn v. Graves, 300 U.S. 308, 316 (1937); Lake Superior Mines v. Lord, 271 U.S. 577, 581-82 (1926).

Nor does the tax violate equal protection as claimed by the Trustee. The Trustee points to M.G.L. c. 59, §5, Seventeenth, which exempts from local taxation "Property, other than real estate, the income from which is taxed under Chapter sixty-two, or would be taxable thereunder if the property yielded income" (emphasis added).

Despite the general exception under G.L. c. 59, §5, Seventeenth, however, the Legislature has provided for direct tax on substantial amounts of property the income of which is also taxed under

M.G.L. c. 62. See, e.g., M.G.L. c. 59, §18, Second (personal property tax on unincorporated business); Mahoney v. Board of Assessors, 362 Mass. 210, 213 n.2 (1972) (citing principal exemptions to such taxation). Real estate does not stand alone.

Moreover, as the Supreme Judicial Court observed:

> There is a rational basis for the Legislature to subject real estate to local taxation (subject to exemptions for certain real estate), and not to subject other income-producing property to local taxation. It can be found in the expectancy that real estate as a class generally will be the beneficiary of local services in a far greater degree than other forms of income producing property.

Smith v. Commissioner of Revenue, Mass. Adv. Sh. (1981) 677, 678, ___ N.E.2d ___.

Any distinction in a tax statute that has a rational basis will survive an

equal protection challenge. Weinstock v. Town of Hull, 367 Mass. 66, app. dismissed for want of substantial federal question, 423 U.S. 805 (1975). Because there are "plausible reasons" for the distinction, no equal protection violation can be found. United States Railroad Retirement Board v. Fritz, 66 L. Ed. 2d 368, 378 (1980); see Minnesota v. Clover Leaf Creamery Co., 66 L.Ed. 2d 659 (1981).

CONCLUSION

Because no substantial federal question is presented, the appeal should be dismissed.

Respectfully submitted,

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Date: July 24, 1981

CERTIFICATE OF SERVICE

I, Michael Broad, Assistant Attorney General, hereby swear that I have by July 24, 1981, served the within Motion to Dismiss by mailing three copies postage prepaid to: William Gabovitch, 40 Court Street, Boston, MA 02108.

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Celia C. De Angelis
Notary Public
My Commission Expires: 11/14/86

Dated: July 24, 1981